

SOUTH AFRICA / JUDGMENT

Dlangamandla v Road Accident Fund (3265/2009) [2011] ZAFSHC 131; 2011 (5) SA 565 (FB) (14 July 2011) [2011] ZAFSHC 131

COURT

Free State High Court, Bloemfontein

BEFORE

M H Rampai

CASE / FILE NUMBER

3265/2009

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3265/2009

In the matter between:

CEBISA DLANGAMANDLAPlaintiff

and

ROAD ACCIDENT FUNDRespondent

JUDGEMENT:

RAMPAI J

HEARD ON: 25 MAY 2011

DELIVERED ON: 14 JULY 2011

- [1] The matter came to court by way of action proceedings. The plaintiff sues the defendant for payment of damages in the amount of R513 010,48 and ancillary relief. The defendant defends the action.
- [2] On the 18th May 2011, my sister Van Zyl J ordered that the issues be separated. Therefore, I only heard the evidence about the issues concerning the merits. The issues concerning quantum stood over for later adjudication, if necessary, in terms of the aforesaid court order.

- [3] In her summons the plaintiff alleged that she was involved in a road accident which took place in Andries Pretorius Street in Bloemfontein on the 7 October 2006 at or about 20:00 when she was run down by a sedan with registration number DBY810FS, a white VW City Golf. She alleged that the sedan was driven by a certain Mr Pule Daniel Letsoaka of Bedelia in Welkom. She further alleged that she was a pedestrian at the time of the accident.
- [4] The plaintiff alleged further that the accident was caused by the sole negligence of the driver of the sedan, Mr P D Letsoaka. She then listed nine grounds of the driver's alleged negligence (vide par 4).
- [5] In its plea the defendant pleaded that it had no knowledge of the particulars of the alleged accident and put the plaintiff to the proof thereof.
- [6] The defendant denied the plaintiff's allegation that the sedan driver was the sole cause of the accident as alleged. The defendant's first alternative and conditional plea was that the accident was caused by the sole negligence of the minor, viz the plaintiff. Three grounds of the alleged negligence were then listed. The defendant's second alternative and conditional plea was that the accident was caused by the contributory negligence of the minor. Accordingly, the defendant prayed that the plaintiff's damages, if proven, should be apportioned in accordance with her degree of negligence vis-à-vis that of the driver.
- [7] The question in the case revolves around the issue of negligence. The plaintiff alleges that the accident was caused by the sole negligent driving of a certain Mr Letsoaka. The defendant denies such an allegation and avers that the collision was occasioned by the exclusive negligence of the plaintiff.
- [8] Ms Mochachatise's demeanour in the witness box was positive. She was a confident witness. She gave evidence in a logical, understandable and systematic fashion. She was candid in answering questions. She made a reasonable concession in favour of the defendant. She was an objective witness. I did not get the impression that she was unduly influenced by her friendship to exaggerate the plaintiff's case or to exacerbate the defendant's case. She was an impressive witness. Her evidence was not tarnished by any contradictions. I do not hesitate to accept her evidence as a credible and reliable version of the accident.
- [9] The evidence of the aforesaid witness was, to a certain extent, albeit in a limited way, supported by that of Ms Dlangamandla. There was no conflict in their evidence. The veracity of the plaintiff was not challenged. I accept her evidence as credible and reliable. The only eye-witness who testified to the merits was the aforesaid young lady, Ms Mochachalise. Besides the oral evidence, certain photographs of the scene and an accident report were exhibited. For the defendant there was no witness to evaluate.
- [10] Now, I proceed to analyse the evidence. The accident took place in Andries Pretorius Street at Navalsig in Bloemfontein at a spot in front of a cash store known as A1 Supermarket in the evening of the 7th October

2006. The plaintiff, then a 16-year-old learner and her friend walked on foot in an easterly direction. They were on their way from Basetsaneng Hostel of Navalsig High School. Noordeinde Road, the street in which they were walking, was running perpendicular to Andries Pretorius Street. At the intersection the two girls turned southwards into Andries Pretorius Street, passed a pedestrian

crossing and walked on the pavement for some 6 metres. A short distance from the western edge of the tarmac composing the traffic

surface of Andries Pretorius Street, they stopped walking. The point where they stood was diagonally opposite the cash store.

- [11] Before embarking upon the tarmac of the roadway, the witness glanced, first to her right, that is to say southwards in the direction of the city. She saw no motor vehicle from that direction. Secondly, she glanced to the left, that is to say northwards in the direction of the highway. She then saw a motor vehicle coming from that side of Navalsig suburban shopping centre. Thirdly, she once again glanced to her right and still saw no motor vehicle coming. The plaintiff was standing on the right-hand-side of the witness all along. According to the witness they glanced together and together made the same observations.
- [12] The objective of the two young pedestrians was to get to the cash store on the eastern side of Andries Pretorius Street. Seeing that there was no vehicle approaching them from the right, they stepped forward still mindful and aware that there was one motor vehicle approaching them from the left-hand-side. Now Andries Pretorius Street is one of the principal arteries of the road network in the city. It joins N1 and N8 highways. It consists of two traffic lanes in each direction. From the highway (N1 freeway) in the north up to Wilcocks Road, there is broad grass traffic island.
- [13] However, further down from Wilcocks Road to the central business district there is no such traffic island. Instead the two opposite streams of traffic are separated by means of two solid white lines on each side of a yellow line. The three together form the centre line of the roadway. On each side of the scene of the accident, the street is flat and straight for a fairly long distance of no less than 200 metres (my estimation). There are street lamps on both sides of the street.
- [14] The two pedestrians safely walked across the two traffic lanes for the northbound stream of traffic until they reached a point on the centre line where they again stood. There they waited for the insured vehicle to pass. It was proceeding down the street in a southerly direction. The vehicle was still on the outer traffic lane for the southbound stream of traffic. While they were still on the centre line, the plaintiff shifted from the right to the left land side of her friend, Nthatuoa. From there she ventured into the inner traffic lane for the southbound stream of traffic. She followed a slightly diagonal line of movement from her witness, who remained standing on the centre line, and walked towards the outer lane. She proceeded towards the point on the inner lane where she met with her disaster.

[15] Her gaze was fixed on the approaching vehicle when she made her move from the centre line. She assured her friend that she was alert to the vehicle on the outer lane. From the brief chat she had with her friend and the way she was walking across the inner lane, I gained the impression that the plaintiff reckoned that the vehicle would stay on course in the outer lane and that she would then cross the lane behind the vehicle once it had passed. As the plaintiff restarted on her passage across the aforesaid eastern inner lane, the driver was approaching from the left. The witness established that the vehicle was on the northern verge of the intersection $\pm$ 25 metres away from the plaintiff when it suddenly changed lanes and veered diagonally in southwesterly

direction and moved over into the inner lane. At that moment the plaintiff was still on her south easterly diagonal course. The driver and the pedestrian were simultaneously making their ways towards the same point. The sudden decision of the vehicle culminated in the collision between the vehicle and the pedestrian. The point of impact was on the eastern inner lane for the southbound stream of traffic.

[16] It is significant to note that, when the pedestrian made her last move from the middle of the roadway, and entered its eastern half, which constituted the driver's correct side, the vehicle was still a distance farther than 25 metres from her and her companion.

[17] Mr Strydom submitted that the accident would not have occurred had it not been for the driver's unexpected change of lanes for no apparent reason. I am persuaded by the submission. I find it impossible on the facts, to acquit the driver of negligence. The only true explanation why the plaintiff was struck down where she was, is to be found in the driver's failure to keep a proper look-out. That and that alone seems to adequately account for the anomalous change of lanes when there was no obvious object which made such manoeuvre necessary.

[18] It was not disputed, in argument, that the driver had been negligent in failing to keep a proper look-out. However, Mr Greyling submitted that, despite the negligence which the driver may have been guilty of, the plaintiff also acted negligently. Counsel submitted that the plaintiff's negligence was either the primary cause of the disaster or jointly operating with that of the driver largely contributed to bring it about.

[19] In support of the foregoing alternative submissions or defences, it was contended that the plaintiff was legally to blame in that she tried to cross the roadway at a place where and at the time when it was unsafe for her to do so instead of using a demarcated pedestrian crossing; that she was invisible because she was dressed in dark garb; that she ignored her friend's warning and that she ran across the roadway in front of the vehicle at an inopportune moment.

[20] The author W. E. Cooper: *Delictual Liability in Motor Law* 1996 edition on p 193-194 writes as follows about a pedestrian's duty when crossing a road:

“A pedestrian who intends crossing a road should do so at an opportune moment and he must exercise reasonable care. He must use his senses to ascertain whether any motor vehicles are approaching. He should keep a proper look-out; he should acquaint himself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety.

Usually a pedestrian will look to left and to right before entering the road. Once he reaches the centre of the road he should devote his attention to motor vehicles approaching from his left.”

BEECH v SETZKOM 1928 CPD 500 on 504;

SINGH v NEW INDIA ASSOCIATION 1966 (4) SA 154 (D);

MASIBUKO v SANTAM 1982 (3) SA 125 (AD).

[21] The same author, *supra*, on page 195 comments as follows about the duties of a driver:

“A driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonably to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus.”

[22] A motor vehicle is a potentially dangerous mobile machine which must always be kept under proper control once it is in motion. A pedestrian like a driver is entitled to the use of a public road. A pedestrian, is a vulnerable human being subject to human frailty. A driver has to know that a pedestrian involved in a collision with a vehicle may suffer serious physical injuries – COOPER *supra* at 195. The younger a child pedestrian the greater the risk of erratic behaviour or errant movement.

[23] The hour was getting on to 19:10 when the plaintiff and her friend set out to the cash store. Although the accident took place during night time and the plaintiff was wearing dark clothes the scene was adequately illuminated. There were burning street lamps on both sides of the street. One of them was right at the spot where the pedestrians had initially stood on the side of the roadway. The lights from the cash store also lit the scene. The lamps of the vehicle involved were also on. It can therefore be accepted that, they too, were casting some appreciable light on the road in general and that the closer the vehicle came to the scene the more visible the dark garbed pedestrian became.

[24] In those prevailing circumstances, I am of the view that the driver should have noticed the pedestrian’s movement and adjusted his speed long before he reached the intersection. In FORDSHAM v AETNA INS 1959

(2) SA 271 (A) at 289H – 279D Schreiner JA remarked that the condition of lightning were of prime importance in judging how a pedestrian in a street should conduct himself. In daytime it may be expected that drivers will readily see pedestrians on the roadway. During night-time however, one cannot so confidently rely on being seen in time by approaching drivers. In *casu* the plaintiff, though walking at night, was not walking with her back towards the direction in which the vehicle was coming. She was walking perpendicular to the

pathway of the vehicle. The street was not only flat, straight and broad but was well lit for her to be easily spotted.

- [25] Moreover, the traffic lights, the proximity of the cash store, the presence of the other person on the eastern pavement in front of the cash store as well as the proximity of Navalsig High School on the north-west corner of the intersection diagonally opposite to the cash store served as warning signs to motorists to approach the intersection with greater care especially at night. It seems to me the driver involved ignored all those danger signs.
- [26] In the circumstances, although the plaintiff was admittedly wearing dark clothes and crossing the street at night outside a pedestrian crossing and without ascertaining whether the traffic light allowed her to do so she was reasonably visible for any careful driver who was keeping a proper look-out to see. The driver should have noticed the plaintiff's movement and adjusted his speed long before he reached the intersection. He failed to do so. He ought reasonably to have seen her. Moreover he should reasonably have foreseen or anticipated the presence of an unseen pedestrian in the vicinity not only on account of the proximity of the school only but the cash store and the traffic lights themselves *SANTAM v NKOSI* 1978 (2) SA 784 (A) at 791F – H. In casu the driver failed to exercise reasonable care and vigilance.
- [27] It has been held that a reasonable prudent pedestrian should not cross the road when doing so exposes him to the reasonable risk of collision with passing vehicles – *SWANEPOEL v PARITY INSURANCE CO LTD* 1963 (3) SA 819 (W). In the instant matter, the plaintiff did not unreasonably expose herself to the reasonable risk of a collision. The vehicle was travelling on the outer lane whereas she was visibly walking on the inner lane. She was not blindly walking across the path of travel used by the driver. She allayed her friend's concern by assuring her that she was alert to the vehicle. Her intention was to let the vehicle to pass first before she could walk across the outer lane.
- [28] Notwithstanding the plaintiff's dark garb, the scene was so well illuminated and so obviously hazardous that she still ought to have been clearly visible to any careful and vigilant driver in the position of the insured driver, Mr Letsoaka – vide *VAN PLETZEN v MARINE & TRADE VERSEKERINGSMAATSKAPPY BPK* 1975 (3) SA 997 (O) per De Wet J.
- [29] I agree that crossing a busy road when the road is not completely clear and when it has no physically broad centre island is certainly a very dangerous practice by a pedestrian. I am also in agreement with the view that such danger is accentuated when there are parked cars on either side of the road, which circumstances cause the vehicles travelling in opposite directions to pass one another in hazardously narrow clearance of a handful of centimetres – *SONDAY v NORWICH UNION FIRE INSURANCE SOCIETY LTD* 1966 (3) SA 231 (C).

- [30] Here the situation was different in many respects. In this instance, however, though there was no centre island, at the critical time the road was reasonably clear, there were virtually no vehicles in three of the four traffic lanes, and the pedestrian was not crossing the lane on which the vehicle had been travelling all along. It was not unreasonable for her to assume, at the time she proceeded from the centre line, that the driver would keep on driving on the outer lane and that he was aware of her presence in the middle of the inner lane.
- [31] Mr. Greyling made efforts to show that the plaintiff was negligent in ignoring her friend's warning. The crux of the contention was that the plaintiff's witness realised that it was unsafe to cross the street at a point not demarcated as a pedestrian crossing. She thus carefully waited in the middle of the roadway to let the coming vehicle pass a distance in front of her before she could proceed further. On the contrary, counsel contended, that because the plaintiff did not appreciate the potential danger of crossing the street outside a pedestrian crossing, she carelessly proceeded farther than the middle of the roadway. By so doing she exposed herself to the greater risk than her friend did. The argument was that her friend was uninjured because she was careful but that she was careless hence she was injured.
- [32] I am unpersuaded by the foregoing argument. The mere fact that the one pedestrian was injured and her companion uninjured does not necessarily mean that, therefore, the injured pedestrian was negligent in her endeavour to cross the road. It was always being a question of fact and degree as to whether a pedestrian endeavouring to cross the road fails to exercise reasonable care or not. It was unwise, unsafe and irresponsible for the plaintiff not to use a pedestrian crossing. Certainly using a pedestrian crossing, especially one regulated by traffic lights, is a whole lot safer than not using it. On the facts, I am persuaded that I cannot with conviction, find that the plaintiff did not exercise reasonable care and that as a result of her failure to do so she met the disaster.
- [33] It is useful to recite the facts in *ADENDORFF v SHIELD INSURANCE CO LTD* 1979 (4) SA 390 (C) at 391G – H where Friedman J had to grapple with a similar argument about two pedestrians where one was harmed and the other unharmed:
- "They crossed the eastern portion of Buitenkant Street until they reached a point approximately two to three paces from the centre line where they stopped in order to wait for traffic proceeding down Buitenkant Street in a northerly direction to pass them. While they were stationary at this point one of the vehicles proceeding down Buitenkant Street suddenly swung out to its right;..."*
- [34] In this instance counsel for the defendant submitted that, if Nthatuoa was able to avoid the accident by waiting on the centre line, there was no reason why the plaintiff could not have done so had she been keeping a proper look-out.
- [35] This argument is, to my mind, not sound in pretty much the same way as the argument in *ADENDORFF'S CASE*, supra. Accepting the plaintiff's version as substantially correct, and assuming in the defendant's favour, that the point of impact was closer to the demarcation line between the inner and the outer lanes than Nthatuoa indicated, the fact remains, that

the plaintiff had not crossed that lane demarcation line when the accident occurred. The accident happened because the driver, contrary to objectively reasonable expectations, suddenly deviated to the right, swung out of the outer lane, moved over the demarcation line onto the inner lane and ran the plaintiff down.

[36] In my view there was no obligation resting upon the plaintiff to take evasive action until she realised or ought to have realised that the vehicle was poised to run her down. The onus of proving contributory negligence was on the defendant. I could detect no negligence on the part of the plaintiff – ADENDORFF’S-case supra..

[37] When she made her move from the centre line, she was well aware of the coming vehicle. She did not blindly walk or run across the roadway ahead of the coming vehicle as did the pedestrian in the case of SA MUTUAL FIRE AND GENERAL INSURANCE CO LTD v MHLAWULI 1977 (1) SA 891 (A). She did not ignore her friend’s warning. The risk undertaken by her was really not a grave one. It has to be borne in

mind that, according to her witness, on reaching the centre line she paused, waited, scanned the road to her left and saw that the coming vehicle was travelling on the outer lane. In my view she took reasonable steps to give it a wide berth. From there she strolled from the centre line into the inner lane after taking reasonable steps to assure herself that there was no vehicle expected to interfere with her during the second half of her transit across the roadway.

[38] Before embarking upon her crossing the inner lane she had reasonably ascertained that there was virtually no traffic coming down that particular lane. Her route across that roadway, as it continued from beyond the centre line to the spot on the inner lane, where she met the disaster, was not carelessly embarked upon. Her transit did not become negligent merely because she was injured while in transit, whereas her friend who remained behind was not injured.

[39] In PEARCE v TAYLOR 1934 EDL 193 on 199 Pittman J commented as follows about the pedestrian duty:

“Obviously the extent of the pedestrian’s duty must be determined in accordance with the circumstances, e.g., the nature and width of the road, and here the one in question is comparatively narrow, and the situation unfolded in the evidence rather one to which the remarks of the present learned Chief Justice in Baratz

- v. Johannesburg Municipality ([1913] T.P.D. at p. 741), should be applied, viz.: “As was pointed out in Clark
- v. Petrie (16 Sc.L.R. pp. 626, 627), there is no obligation on a foot-passenger crossing a street to be constantly looking in all directions. It may be a wise precaution, but to omit it is not always negligence. A foot-passenger must take reasonable precautions to see that at the moment of crossing he is not in immediate danger of being run over, but he need not be constantly looking back to see if he is being pursued by a tram.”

- [40] In this matter, I could detect no negligence in the conduct of the plaintiff. I am of the view that the alternative defences, which the defendant sought to establish, were not based on solid ground, if my digestion and conception of the plaintiff's conduct be correct. But even if my reasoning be erroneous and her conduct should be regarded as a negligent breach of the pedestrian duty to exercise reasonable care in crossing a road, the plaintiff must, nonetheless, still succeed. I have come to this conclusion because I am satisfied, firstly, that it was the insured driver's negligence which was the effective cause of the disaster and secondly, that the plaintiff was not causally negligent. Therefore, I cannot logically find that she has to share any responsibility owing to her own negligence in the air.
- [41] The evidence clearly points to Mr. Letsoaka, as the person exclusively responsible for the accident. The evidence of an eye-witness showed that, seconds before the disaster, the driver could, while the pedestrian could not, have avoided the collision – PEARCE v TAYLOR, supra, at 200. The defendant's defence of contributory negligence was not established. The defendant failed to discharge the onus that the plaintiff did not keep a proper look-out. The driver's negligence was further evidenced by his failure to sound the hooter, to slam the brakes or to take any other meaningful action to avoid the collision.
- [42] It remains to comment briefly about two aspects. It was alleged in the accident report that the pedestrian, in other words the plaintiff, ran across the road in front of the vehicle. According to the rough sketch, the point of impact was on the outer lane. Both aspects were inconsistent with the evidence. The plaintiff's witness denied she supplied such information to Student-Constable Mothupi.
- [43] Neither the insured driver nor the aforesaid constable were called to testify on behalf of the defendant. In GALANTE v DICKINSON 1950 (2) SA (A) at 460 Schreiner JA said the following about such a situation (failure to testify):

"It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that, in an accident case where the defendant was himself the driver of the vehicle, the driving of which the plaintiff alleges was negligent and caused the accident, the Court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."

It is our law and it remains our law.

- [44] Accordingly, I make the following order:

The defendant is liable to the plaintiff in such an amount of damages as she may prove or as may be agreed upon.

The defendant is directed to pay the costs of the trial.

M. H. RAMPAL, J

On behalf of the plaintiff: Adv. S. Strydom

Instructed by:

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On behalf of the respondent: Adv. P. Greyling

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